IN THE

United States

Circuit Court of Appeals,

FOR THE NINTH CIRCUIT.

In the Matter of the Application of
ALBERT SICHOFSKY,
Also Known as Abram Sichofsky,
for Writ of Habeas Corpus.

Appellant's Points and Authorities on Appeal From Order Denying Writ of Habeas Corpus.

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To the Honorable United States Circuit Court of Appeals, for the Ninth Circuit, and to the Honorable Erskine M. Ross, Justice Thereof:

This is an appeal from an order denying a writ of *habeas corpus.*

As shown by the petition on file [Tr. p. 14], petitioner was charged by indictment as follows:

"That Abram Sichofsky, alias Alberto Sichofsky, alias Max Fimen, alias Carlos Nunn, whose full and true name is, other than as herein stated, to the grand jurors unknown, late of the Southern Division of the

Southern District of California, heretofore, to-wit, on or about the twenty-third day of August, A. D. 1920, when the United States was at war with the Imperial German Government, at Tia Juana, county of San Diego, within the state and Southern Division of the Southern District of California, and within the jurisdiction of the United States and this Honorable Court, did knowingly, wilfully, unlawfully and feloniously enter, and attempt to enter, the United States from a foreign country, to-wit, the republic of Mexico, without then and there bearing and having in his possession a passport, duly visaed in accordance with the terms of section 31 of an executive order dated August 8, 1918, issued pursuant to an act of Congress approved May 22, 1918, and entitled: "An act to prevent, in time of war, departure from and entry into the United States, contrary to public safety," and supplemental to the Presidential Proclamation of August 8, 1918, the said Abram Sichofsky, alias Alberto Sichofsky, alias Max Fimen, alias Carlos Nunn, being then and there a male citizen of Poland of the age of sixteen years and over."

This indictment was drawn under an act of May 22, 1918, which act in full is as follows:

> (Sec. 1) (United States—entry or departure —restrictions—offenses.) That when the United States is at war, if the President shall find that the public safety requires that restrictions and prohibitions in addition to those provided otherwise than by this Act be imposed upon the departure of persons from and their entry into the United States, and shall make public proclama-

tion thereof, it shall, until otherwise ordered by the President or Congress, be unlawful—

(a) For any alien to depart from or enter or attempt to depart from or enter the United States except under such reasonable rules, regulations, and orders, and subject to such limitations and exceptions as the President shall prescribe;

(b) For any person to transport or attempt to transport from or into the United States another person with knowledge or reasonable cause to believe that the departure or entry of such other person is forbidden by this Act;

(c) For any person knowingly to make any false statement in an application for permission to depart from or enter the United States with intent to induce or secure the granting of such permission either for himself or for another;

(d) For any person knowingly to furnish or attempt to furnish or assist in furnishing to another a permit or evidence of permission to depart or enter not issued and designed for such other person's use;

(e) For any person knowingly to use or attempt to use any permit or evidence of permission to depart or enter not issued and designed for his use;

(f) For any person to forge, counterfeit, mutilate, or alter, or cause or procure to be forged, counterfeited, mutilated, or altered, any permit or evidence of permission to depart from or enter the United States;

(g) For any person knowingly to use or attempt to use or furnish to another for use any false, forged, counterfeited, mutilated, or altered

permit, or evidence of permission, or any permit or evidence of permission which, though originally valid, has become or been made void or invalid. (... Stat. L.)

(Sec. 2) (Necessity of passport.) That after such proclamation as is provided for by the preceding section has been made and published and while said proclamation is in force, it shall, except as otherwise provided by the President, and subject to such limitations and exceptions as the President may authorize and prescribe, be unlawful for any citizen of the United States to depart from or enter or attempt to depart from or enter the United States unless he bears a valid passport. (... Stat. L. ...)

(Sec. 3) (Punishment.) That any person who shall wilfully violate any of the provisions of this Act, or of any order or proclamation of the President promulgated, or of any permit, rule, or regulation issued thereunder, shall, upon conviction, be fined not more than $10,000 or, if a natural person, imprisoned for not more than twenty years, or both; and the officer, director, or agent of any corporation who knowingly participates in such violation shall be punished by like fine or imprisonment, or both; and any vehicle or any vessel, together with its or her appurtenances, equipment, tackle, apparel, and furniture, concerned in any such violation, shall be forfeited to the United States. (... Stat. L. ...)

(Sec. 4) (Definitions—"United States"—"Person.") That the term "United States" as used in this Act includes the Canal Zone and all territory and waters, continental or insular, subject to the

> jurisdiction of the United States. The word "Person" as used herein shall be deemed to mean any individual, partnership, association, company, or other unincorporated body of individuals, or corporation, or body politic. (... Stat. L. ...) [Tr. p. 4 *et seq.*]

The indictment herein, as above set forth, charges said entry on or about the 23d day of August, 1920, the executive order above set forth being dated August 8, 1918. As further set forth in said petition, on or about the 10th day of November, 1919, after the signing of the armistice on November 11, 1918, a subsequent act was passed by Congress, being entitled "Act of November 10, 1919, Chap. 104-41 Stat. L. 353," which act is fully set forth in the transcript, page 8, and is in the same words as the act of the 22d day of May, 1918, except that the preamble of the original act reads "That when the United States is at war," and that of the second act reads "That if the President shall find that public safety requires."

Upon these acts, and the additional act, or joint resolution of Congress, of date March 3, 1921, section 3115, entitled "Termination of War-time Acts," petitioner contends that there was no law in force at the time he plead guilty to the indictment herein, to-wit, on the 21st day of March, 1921, upon which he could be convicted; and further, as will be more specifically set out, that after said plea the court lost jurisdiction of his person by reason of the court's action in surrendering his person in custody to the state courts of the state of California.

The opinion of the trial court upon the questions at issue is contained in transcript, page 33 *et seq.*, and we shall deal with the question as presented in the court's opinion:

Point One—The Law Was Repealed.

Our first contention is that, the war having ceased on November 11, 1918, the necessity for the law ceased, and therefore that there was no law in existence at the time of the passing of the act. Upon this question there is little, if any, law in this country, the leading case, however, being

> Hamilton v. Ky. Distillers & Warehouse Co., 251 U. S. p. 146,

wherein, in one of the most ably reasoned opinions of the Supreme Court, Judge Brandeis decided the question of the Volstead Act, and held that for the purpose of this act war still continued, citing in support thereof

> Hijo v. United States, 194 U. S. 315, 323, 24 Sup. Ct. 727, 48 L. Ed. 994;
>
> The Protector, 12 Wall. 700, 702, 20 L. Ed. 463;
>
> United States v. Anderson, 9 Wall. 56, 70, 19 L. Ed. 615,

these cases dealing with the determination of the Civil War, examination of which cases will show that the Supreme Court in those cases held that, so far as the Civil War was concerned, in respect to the several states, the war began and ended upon different dates.

As well it was held in these cases that the determination of war was an executory and not a judicial power. However, as pointed out in the Hamilton case, the present war has a different status. In the Civil War there were only two belligerents, while in the present war the United States was only an ally of European sovereignties, and prior to the date of this indictment peace had been ratified by these European sovereignties.

We therefore contend, as an original proposition, as pointed out by Judge Brandeis' opinion, that this court, and the trial court, should have taken judicial notice of all the facts connected with the present war, and in such case should have held that the war is ended; and in support of our contention we respectfully refer to the Hamilton case, above mentioned. In addition thereto we contend that the act of November 10th, 1919, was a direct repeal of the act of the 22d day of May, 1918, in that said act dealt with the same subject matter, prescribed the same penalty, and conferred the same power upon the President of the United States.

In interpretation of statutes, it is well put in 36 Cyc., at page 1096:

> "* * * it is a well-settled rule that where a statute prohibits a particular act, and imposes a penalty for doing it, and a subsequent statute imposes a different penalty for the same offense, the latter statute operates by way of substitution and not cumulatively, and repeals the former, and

this whether the penalty is increased, or diminished; the intention to inflict two punishments for the same offense not being imputable to the Legislature. * * * An act intended to be a complete system of statutory laws relating to crimes and punishments supersedes or repeals all existing laws on that subject."

And a number of cases are cited under this rule; among others are the following United States cases:

U. S. v. Tynen, 11 Wall. (U. S.) 88, 20 Law. Ed. 153;

Norris v. Crocker, 13 How. (U. S.) 429, 14 Law. Ed. 210;

U. S. v. Claflin, 97 U. S. 546, 553.

It Is an Elementary Question of Statutory Construction, Where Two Acts Are Clearly in Conflict, and It Appears That the Latter Was Intended as a Substitute for the First, the Latter Repeals the Former.

"A statute may be repealed by implication as well as in direct terms; and it is well settled, that where a subsequent act is repugnant to a prior one, the last operates without any repealing clause, as a repeal of the first; and where two acts, passed at different times, are not in terms repugnant, yet, if it is clearly evident that the last was intended as a revision or substitute of the first, it will repeal the first to the extent in which its provisions are revised or substituted."

Pierpont v. Crouch, 10 Cal. 315, 316.

"Every statute must be considered according to what appears to have been the intention of the Legislature, and even though two statutes relating to the same subject be not in terms repugnant or inconsistent, if the later statute was clearly intended to prescribe the only rule which should govern the case provided for, it will be construed as repealing the original act."

City v. Bird, 15 Cal. 295, 296.

"When the Legislature makes a revision of particular statutes, and frames a general statute upon the subject matter, and from the framework of the act it is apparent that the Legislature designed a complete scheme for this matter, this is the legislative declaration that whatever is embraced in the new law shall prevail, and whatever is excluded is ignored."

State v. Conkling, 19 Cal. 501, 513.

See also:

Peo. v. Burt, 43 Cal. 560;
Peo. v. Lon Me, 49 Cal. 355;
Treadwell v. Board etc., 62 Cal. 563;
In the Matter of Yick Wo, 68 Cal. 294;
Charnock v. Rose, 70 Cal. 189;
Frazer v. Alexander, 75 Cal. 147, 153.

and as well:

Read v. Thurmand, 269 Fed. p. 252;
U. S. v. Shathoff, 268 Fed. p. 417.

It is with reference to statutes defining crimes and providing their punishment that repeals operate with the utmost freedom. In such cases the extinction of the statute is understood to be an indication that the sovereign power no longer desires the former crime to be punished or regarded as criminal. Therefore, when such a statute is repealed, it is as if it never existed except for the purpose of proceedings previously commenced, prosecuted, and concluded, and even a plea of guilty before the repeal will not authorize the court to pass sentence.

25 Ruling Case Law p. 194.

See also:

Crow v. Cartledge, 99 Miss. 221, 54 So. 947, Ann. Cas. 1913E 470;

Trippet v. State, 149 Cal. 521, 86 Pac. 1084, 8 L. R. A. (N. S.) 1210 and note.

Note:

94th Am. Dec. page 218.

Such being the case, the Government in this case had no right to pronounce the sentence herein pronounced.

In addition thereto, by the act of December 24, 1919, the act being the Appropriation Bill, for 1920, the act provides as follows:

> "That so much of the sum of $600,000 appropriated by section 4 of Public Act Numbered 79 of the Sixty-sixth Congress, entitled 'An act to regulate further the entry of aliens in the United

States,' as may be necessary is hereby made immediately available for expenses of regulating entry into the United States, in accordance with the provisions of the act approved May 22, 1918; provided, that not more than $450,000 of said sum shall be made during the remainder of the fiscal year 1920."

Fed. Stat. An. 1919, Sup. p. 75.

In the case at bar we respectfully invite attention to the fact that under the indictment herein defendant is charged with entry without having the passport visaed, in accordance with the terms of section 31 of the executive order, dated August 8, 1918, which is as follows:

"Subject to the exceptions and limitations hereinbefore set forth no alien shall be allowed to enter the United States unless he bears a passport duly visaed in accordance with the terms of the Joint Order of the Department of State and the Department of Labor issued July 26, 1917. Said Joint Order and the amendments thereto and instructions issued thereunder are hereby confirmed and made part hereof by reference, so far as their provisions are not inconsistent with these rules and regulations, or with the President's proclamation of August 8, 1918. A copy of said Joint Order is inserted in the appendix to these regulations."

In other words, the defendant is nowhere charged with a violation of the act, but of the violation of the proclamation under the act. The act itself specifically provides (section 3) that "any person who shall wil-

fully violate any of the provisions of this act, or any order or proclamation of the President promulgated, shall be," etc.

In dealing with acts of this character it has been repeatedly held that while Congress may have the right to exclude aliens in any manner they see fit, that when Congress sees fit to promote such a policy further by subjecting the persons to infamous punishment, that such a statute immediately becomes a penal law, subject to strict interpretation; as Congress has no police powers,

Ocean Steamship Co. v. Stranahan, 214 U. S. 320;

Keller v. U. S., 213 U. S. 138;

U. S. v. Robertson, 257 Fed. 195, opinion by Judge Trippet;

or, as otherwise stated, criminal statutes must be strictly construed, and in the event of doubt, such doubt shall be resolved in favor of the accused. The rule of reasonable doubt is applicable to the law, as well as the facts of the case.

Joplin Mercantile Co. v. U. S., 236 U. S. 531.

And as well, the repeal of a criminal statute operates as a repeal of the statute in its entirety, and does not permit the pronouncing of judgment thereon unless there is a saving clause thereto.

Wheaton v. U. S., 5th Cranch. 281;

Extended note *In re* Cline, 1 Ann. Cases 219.

In the case at bar it is first contended that the act ceased to be effective because the necessity for said act no longer existed, which necessity ceased prior to the time that said act of the defendant was committed.

Hamilton v. Ky. Distillers, 251 U. S. 146.

If it can be now contended that said act was not repealed by necessity prior to the time of its commission, then that act was directly repealed by the act of November 10, 1919, being the same act in revised form, and by the joint resolution of Congress of date March 3, 1921, section 3115, entitled "Termination of War-time Acts. Certain acts, resolutions and propositions terminated. Exception certain acts repealed." To which act is added the saving clause, to-wit:

> "Nothing herein contained shall be held to exempt from prosecution or relieve from punishment any offense heretofore committed in violation of any act heretofore repealed, or which may be committed while it remains in force as herein provided."

This saving clause is no broader than is the saving clause of date February 25, 1871, which clause reads, "The repeal of any statute shall not have the effect to release or extinguish any penalty," etc., which saving clause is directly referred to and considered in the case of U. S. v. Reisinger, 128 U. S. 398, and which saving clause is practically identical with section 329 of the Political Code:

> "The repeal of any law creating a criminal offense does not constitute a bar to the indictment

> or information and punishment of an act already committed in violation of the law so repealed, unless the intention to bar such indictment or information and punishment is expressly declared in the repealing act. (Amendment approved 1881; Stats. 1881, p. 6.)"

The contention of the trial court is that these saving clauses save this act, but, as above pointed out, it must be borne in mind that the defendant is nowhere charged with a violation of said act, but a violation of the Presidential proclamation. We have made diligent search and will continue to do so for a case under a Presidential proclamation or rule which has been repealed, but so far we have been unable to find any. However, there are a line of cases under a similar state of facts which are positively and directly in point, the leading case being the case of Spears v. County of Modoc, 101 Cal. p. 303. In this case by a mere statute the county was permitted to pass a liquor ordinance. Pursuant to this liquor ordinance defendant was arrested, but before final judgment the ordinance upon which he was convicted was repealed, without a saving clause. The contention being in that case that even though the law had been repealed, that prosecution could still follow. Judge Harrison in that case states as follows:

> "The effect of repealing a statute is to obliterate it as completely from the records of the parliament as if it had never passed; and it must be considered as a law that never existed, except

> for the purpose of those actions which were commenced, prosecuted and concluded whilst it was an existing law. This principle has been applied more frequently to penal statutes, and it may be regarded as an established rule that the repeal of a penal statute without any saving clause has the effect to deprive the court in which any prosecution under the statute is pending, of all power to proceed further in the matter. 'The repeal of a statute puts an end to all prosecutions under the statute repealed, and to all proceedings growing out of it pending at the time of the repeal.' (Sedgwick's Statutory and Constitutional Law, 130. See also Endlich on Interpretation of Statutes, Sec. 479.)"

And as well it was therein stated that while section 329 of the Political Code above referred to had a saving clause, that this saving clause only had relation to the penal laws passed by the Legislature, and had no relation whatsoever to the ordinances permitted to be passed pursuant to a general law.

This doctrine above stated has been approved in Barton v. Gadsden, 79 Ala. 495; Rutherford v. Swenk, 96 Tenn. 564; from which it follows that, as stated by Justice Lamar in the case of U. S. v. Reisinger, that a prior Legislature has no right to control a future Legislature, and if Congress had so desired to make offenses under Presidential proclamations offenses which could be punished after the repeal of such proclamation, it could do so by the saving clause therein contained.

From which we respectfully contend that the act above set forth has been repealed, without a saving clause, and, as set forth in the petition for writ heretofore filed, there was no law in existence at the time said judgment was pronounced, under which the defendant could be legally prosecuted.

Point Two—The Court Lost Jurisdiction of the Defendant.

Our second contention is that it is a well-settled law of this state that in a case of conflicting jurisdiction between state and federal courts, it is the settled doctrine of this court that a court having possession of a person cannot be deprived of the right to deal with such person until its jurisdiction is exhausted, and that no other court has the right to interfere with such custody or possession.

Ableman v. Booth and U. S., 16 Law Ed. p. 506.

Ex parte Johnson, 17th Sup. Ct. Rep. p. 735.

It is clear that the rights and duties of a court, under such a law, even admitting that the defendant plead guilty to a valid law, consist of but one, and that duty was to issue a commitment and forthwith transmit the prisoner to McNeill's Island.

In re Jennings, 118 Fed. p. 479.

If such is not done, the court having granted an unlawful stay, which stay prejudices and interferes with the rights of the defendant, such unlawful stay divests

the court of jurisdiction further to proceed in this matter.

The rule is announced in 8th Ruling Case Law p. 422, and again *In re* Webb, 89 Wis. 354 (46th Am. St. Rep. p. 846), as follows:

> "A court cannot suspend the execution of its sentence pronounced in a criminal case, except as an incident to the review of the case upon writ of error, or upon other well-established legal grounds. Therefore, if it does by its order, after sentencing the accused to imprisonment for a term specified, purport to suspend such imprisonment until the further order of the court, it cannot, after the expiration of the term specified, direct his imprisonment, though during such term he was at liberty, and suffered no imprisonment whatever."

In the case at bar, as shown by the petition, the defendant made no request for stay of execution, beyond a five-day period, but such request was made upon the application of the district attorney, and thereafter the court permitted said stay to be further extended.

Upon the second point referred to, in Ableman v. Booth, 21 Howe 506, and *Ex parte* Johnson, 167 U. S. 120, it is stated:

> "It is a well-settled law that a court having possession of a person or property cannot be deprived of the right to deal with such person or property until its jurisdiction is exhausted, and that no

court has the right to interfere with such custody or possession,"

or, as has been otherwise stated:

"Comity between federal and state courts is necessary to prevent scandal from unseemly conflicts of jurisdiction and to promote a decent and orderly administration of justice. It has been considered that the exercise of jurisdiction by a federal court becomes one of discretion, where the only reason why it should not take cognizance of a cause rests on the ground of comity; * * *. Where a state and a federal court have concurrent jurisdiction over the same parties or privies and the same subject matter, the tribunal where jurisdiction first attaches retains it exclusively, and will be left to determine the controversy and to fully perform and exhaust its jurisdiction, and to decide every issue or question properly arising in the case. This jurisdiction continues until the judgment rendered therein is fully satisfied."

15 C. J. 1160-1161.

Such being the case, we respectfully insist that the court having had jurisdiction over Sichofsky, that the jurisdiction should have been retained until exhausted, and that by doing any act which permitted another court to take jurisdiction that such jurisdiction of the federal court was lost and cannot now be recalled.

In the case of People v. Barrett, 95 Am. State Rep. 230, the court therein held that the trial court has no jurisdiction to indefinitely suspend sentence after con-

viction. As well this subject is fully covered in *Ex parte* U. S., 242 U. S. p. 27, wherein the opinion by Chief Justice White deals with the history of the law, and what can be done by a court after sentence has been imposed. The reason for the rule is stated in the Barrett case as follows:

> "There can be no doubt that a court has the right, in a criminal case, to delay pronouncing judgment for a reasonable time, for the purpose of hearing and determining motions for a new trial or in arrest of judgment, or to give the defendant time to perfect an appeal or writ of error, or for other proper causes; but to suspend indefinitely the pronouncing of the sentence after conviction or to suspend indefinitely the execution of the judgment after sentence pronounced, is not within the power of the court. To allow such a power would place the criminal at the caprice of the judge. If the judge can delay the sentence one year, he could delay it for fifteen years, or any length of time."

See also U. S. v. Wilson, 42 Fed. p. 748, wherein it is distinctly stated that the court had no power to suspend sentence, except for the short periods pending determination of motions, or considerations arising in the cause after verdict.

See also:

Mentor v. U. S., 244 Fed. p. 422;

Ex parte Clendenning, 19 L. R. A. (N. S.) 1041.

In the case at bar, as will be pointed out, the defendant was not present at the time the order was made transferring him to the state court. In the case of Schwabb v. Berggren, 143 U. S. 442, it was therein distinctly held that the defendant had the right to be present at all stages of the proceedings, and certainly where an order was made, as was made in this case, after judgment, suspending execution thereof, so as to deprive defendant of one of his rights, the court exceeded its jurisdiction; first, by making an order not in the presence of the defendant; second, by making an order which might prejudice his rights.

The original writ in this action (page 21) was directed to the United States marshal, and also to the sheriff of Los Angeles county. In the return herein, the sheriff of Los Angeles county, in whose custody the prisoner was confined, sets forth fully the commitment by the Superior Court of Los Angeles county, which commitment certainly would not have issued had not the federal judge released the custody of the defendant, in the state courts, and it is quite clear now that both the commitment in the state court and in the federal court are now outstanding commitments.

Closing Argument.

Both the points above made we believe to be original points, insofar as the citation of authorities is concerned. As to the first point, as above set forth, we contend that the law was repealed by direct enactment, by necessity, and by the joint resolution of Congress.

Treated singly there might be some reason for doubt, but treated collectively we cannot see how the trial court could have said that there was no repeal of this law.

In the first place, the act of 1919, taking place as it did, at a time when the peace treaty was offered for ratification by Congress and the Senate, and refused, it clearly showed the intention of Congress to repeal the war-time Immigration Act, and to give the President powers thereunder.

Second, the enactment of this act, and the actions of our allies during this period, clearly showed that the war had ceased.

Third, the joint resolution of Congress, on March 3, 1921, clearly showed that Congress intended to directly repeal this and all allied acts.

Such being the case, we respectfully contend that all these facts, taken together, show a repeal of the act in question.

Upon the question of loss of jurisdiction of the person of the defendant, by permitting the defendant to be tried by the state court while in custody, and under commitment of the United States courts, we again contend that this procedure was a loss of jurisdiction by the United States court. It is never our desire to in any way criticise the opinion of a trial court, or an appellate court, for the writer of this brief is of the opinion that as between lawyers and judges, upon an

original question, there is always reason for, and the right to a diversity of opinion. However, we wish to call the court's attention to the reasoning of the trial court, as set forth in his opinion [Tr. p. 38], where it is stated:

"It is asserted, however, that the court lost all of its jurisdiction thus acquired in virtue of the order made permitting the petitioner, all the while in custody of the United States marshal, to be tried in the state court as for the crime of grand larceny. It may be true, yet this court having no concern with the matter does not express any opinion thereon, that in view of the jurisdiction of this court attaching to the person of the defendant in the behalf and respects hereinabove enumerated and referred to, the Superior Court of the state of California could and did acquire no jurisdiction to try him, at the time it did, as for an asserted violation of the law of the state of California. If that be so and if that court lacked jurisdiction, it will be so determined in appropriate tribunals. I discover nothing, however, based either upon reason or authority, from which it may now be adjudged that the action of this court intemporarily staying the execution of the judgment of this court, served to divest this court of jurisdiction to require petitioner to stand for judgment as for the admitted violation of the federal law. It would be a strange and bold assertion, in my judgment, for this court, possessing the amplest jurisdiction as above referred to, to hold that it had completely divested itself of all jurisdiction in the premises merely by an order staying execution. I see nothing in the decision relied upon by petitioner (*In re* Jennings, 118 Fed. 479) requiring such conclusion."

Such opinion, in itself, seems to answer the question above stated.

At the time that the order staying execution was made, as set forth in the petition, the defendant was not represented by counsel, nor was he in any way advised of his rights. The order was made *ex parte,* and upon application of the district attorney of Los Angeles county. If a trial judge possesses the jurisdiction to release a defendant, to take him to Los Angeles to be tried, to San Francisco, or any other place, it might as well be said that a trial court, if it saw fit, might permit a marshal of the United States Government, or a sheriff of any county, to take a prisoner, convicted and ordered to a penitentiary, to the South Sea Islands, for the indefinite period of ten or fifteen years, at which time he might return the prisoner to the court, and say that he must serve his time.

Jurisdiction in a criminal matter primarily means jurisdiction of the person, and, as pointed out in the cases above cited, as to questions of comity, while a state or the Government may have equal right of jurisdiction over the person of a defendant, the one which first exercises it exercises it to the exclusion of the other; and it may be added, as an idiom to the above maxim, that the state or government which surrenders jurisdiction of the person of a defendant in a criminal matter, by comity or otherwise, to the other jurisdiction, loses it to all intents and purposes.

From all of which we respectfully insist that the order denying petitioner writ of *habeas corpus* herein should be reversed, with directions to release the prisoner.

Respectfully submitted,

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